NO. 49561-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

EDWIN TOM SANTOS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 16-1-00518-5

BRIEF OF RESPONDENT

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SERVICE		
	Sara Sofia Taboada 1511 Third Avenue, Suite 701 Seattle, Wa 98101 Email: sara@washapp.org and wapofficemail@washapp.org	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED April 12, 2017, Port Orchard, WA _____ **Original e-filed at the Court of Appeals; Copy to counsel listed at left.** **Office ID #91103 kcpa@co.kitsap.wa.us**

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether any fact in the case supported the giving of an unwitting possession instruction?

2. Whether evidence of Santos's proximity to a stolen vehicle when first seen by law enforcement was admissible as res gestae evidence?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Edwin Tom Santos was charged by information filed in Kitsap County Superior Court with possession of a controlled substance, methamphetamine. CP 1.

Santos moved to suppress the drug evidence. CP 6. Hearing was had on the motion. RP (6/17/16) 7. The motion was denied. RP (6/17/16) 48. Findings of Fact and Conclusions of Law For Hearing on CrR 3.6 were entered. RP (9/23/16) 6; CP 97. He also moved to suppress the circumstances of his arrest. RP (7/25/16) 10-13. Those circumstances included that Santos was first seen by law enforcement when he and two of his confederates were with a stolen car. RP (7/25/16) 12-13. The trial court allowed the circumstances of the arrest as res gestae explaining the reason why the police contacted Santos. RP (7/25/16) 15-16. The defense was allowed to cross-examine on the fact that Santos was not charged with

regard to the stolen car. RP (7/25/16) 13; (7/26/16) 164.

Santos offered an unwitting possession instruction. CP 44. He also asserted proposed instructions attempting to insert a mens rea element into unlawful possession—intent to possess (CP 45) and knowingly to possess (CP 46). The trial court rejected the unwitting possession instruction. RP (7/27/16) 201. The trial court also rejected the knowledge instruction (RP (7/27/16) 206) and the intent instruction (RP (7/27/16).

Santos was found guilty. CP 62. He received a standard range sentence. CP 72. The present appeal was timely filed. CP 81.

B. FACTS[1]

Kitsap County Sheriff's Deputy Michael Mezen was on patrol when he came across a Volvo SUV on the side of the road. RP 184. He observed three males, two on the passenger side and one on the driver's side. RP 184. He asked if they needed help, they said no that they were having car trouble but a ride was coming. Id. Deputy Mezen moved on but ran the plate number of the car and discovered that it was stolen. Id.

The deputy returned to the car and found that the three males were gone. RP 184. He had seen that the males had backpacks and had seemed

[1] The volume of VRP dated 7/25/16, 7/26/16, and 7/27/16 include the trial of the case and will hereinafter be referred to as "RP."

to be removing items from the car. RP 185. The deputy looked around and was contacted an employee at a nearby nursery; the employee told the deputy that three males with backpacks were sitting inside on a bench. Id. The deputy went to the back entrance while other law enforcement units arrived at the front. RP 186. Two of the males had been detained at the front entrance and while the deputy spoke to them, another nursery employee advised that one male with a backpack had run out the back entrance. Id. The two detained males identified the third male as "Eddie." RP 194. Santos was contacted outside the back of the nursery. Id.

It was determined that Santos had an active arrest warrant. RP 187. Santos was arrested and a search incident to arrest discovered a pipe in his right pants pocket. RP 187-88. The pipe was placed in a property bag and placed in an evidence container at the Sheriff's office. RP 188-89. Deputy Mezen opined, based on training and experience, that there was a usable amount in the pipe. RP 189-90.

The residue in the pipe was tested and found to contain methamphetamine. RP 174. The testing procedure involved the tester scraping substance from inside the pipe with a scalpel. RP 177.

III. ARGUMENT

A. NO EVIDENCE IN THE CASE SUPPORTED THE GIVING OF AN UNWITTING POSSESSION INSTRUCTION.

Santos argues that the trial court erred in refusing to instruct the jury on the defense of unwitting possession. This claim is without merit because it relies on evidence presented by a Washington State Patrol Crime Lab witness who had nothing whatever to do with the question of whether Santos possessed the pipe or not. The expert merely tested the residue in the pipe and concluded that it contained methamphetamine. No other evidence pertaining to Santos's possession was advanced by the defense.

Possession of drugs is a strict liability offense and the state need not prove knowledge of possession. *State v. Sundberg,* 185 Wn.2d 147, 149, 370 P.3d 1 (2016); RCW 69.50.4013. However, as Santos points out, the perceived harshness of strict liability has led to the creation of the defense of unwitting possession. Id. The defense must be established by a preponderance of the evidence and the defendant has the burden of establishing the defense at that level of proof. Id. The defense may be supported by showing, by preponderance, that the defendant did not know that he possessed a controlled substance or that he did not know the nature of the substance he possessed. *State v. Staley,* 123 Wn.2d 794, 799, 872

P.2d 502 (1994).

In a criminal trial "[e]ach side is entitled to have the trial court instruct upon its theory of the case if there is evidence to support the theory." *State v. Hughes,* 106 Wn.2d 176, 191, 721 P.2d 902 (1986) (citation omitted). However, "[o]n the other hand, it is prejudicial error to submit an issue to the jury when there is not substantial evidence concerning it." Id. (citation omitted). Substantial evidence is that quantum of evidence "sufficient to persuade a fair-minded, rational person of the declared premise." *Merriman v. Cokeley,* 168 Wn.2d 627, 631, 230 P.3d 162 (2010). Still, as Santos asserts, the proponent of a jury instruction may rely on any evidence in the case to establish the necessary amount of evidence to support the giving of an instruction. Brief at 5, *citing State v. Fernandez-Medina,* 141 Wn.2d 448, 456, 6 P.3d 1150 (2000).

Santos's argument seems to be a variation of a defense based on the small amount of drugs possessed—the "measurable amount" defense. *See State v. Bennett,* 168 Wn. App. 197, 275 P.3d 1224 (1012) (no Wn. App. pagination is found in the Westlaw database; the principle referred to is found at paragraph 39). But this Court rejected that argument, holding that "it was unlawful for Bennett to possess *any amount* of methamphetamine, including residue." Id. at paragraph 40 (emphasis

added). This where, as in the present case, "Bennett possessed glass pipes that tested positive for methamphetamine residue." Id. It should be noted that *Bennett* is a constructive possession case and that an unwitting possession instruction had been given. Id. at paragraph 34.

But in another small amount case, strikingly similar to the argument in the present case, Division I affirmed the denial of the instruction. *State v. Buford,* 93 Wn. App. 149, 967 P.2d 548 (1998). There, a crack pipe had been taken from under Buford's hat. Id. at 150. The trial court rejected the unwitting possession instruction because no evidence supported it. Id. at 151. First, the court considered the quantum of proof that a defendant must produce before he is entitled to an unwitting possession instruction. The Court held that

> a criminal defendant is not entitled to an unwitting possession instruction unless the evidence presented at trial is sufficient to permit a reasonable juror to find, by a preponderance of the evidence, that the defendant unwittingly possessed the contraband.

93 Wn. App. at 153. Next, the Court considered whether or not Buford should get the instruction based on his small amount theory. The answer was no. The Court held

> In this case, the only evidence that could arguably support Buford's claim that he unwittingly possessed the cocaine is that the amount of cocaine seized was small and had to be scraped out of the crack pipe with a scalpel. But this evidence, without more, does not support an inference that Buford unwittingly possessed the cocaine. In fact, as the

> State contends, Buford's proposed instruction would have invited the jury to engage in speculation or conjecture:
>
> > Without receiving some basic facts-such as where did the defendant get the pipe, how long had he been carrying the pipe, did he express dismay that he possessed the pipe, why was he carrying the pipe under his hat, did he know what the pipe was used for, and did he know what cocaine looked like-the jury could not have properly utilized [Buford's proposed unwitting possession] instruction.
>
> Therefore, as the trial court found, the evidence was not sufficient to permit a reasonable juror to find, by a preponderance of the evidence, that Buford unwittingly possessed the cocaine. Accordingly, the trial court properly refused to give the unwitting possession instruction that Buford requested.

93 Wn. App. at 153 (citation omitted). Thus the *Buford* court rejected the very same argument that Santos advances here.

Here, the facts are the same as in *Buford*. Here, Santos's drug pipe was taken from his person as was the drug pipe in *Buford*. Here, as there, the controlled substance had to be scraped from the pipe with a scalpel. And here, as there, this fact dopes not bottom an inference that Santos's possession was unwitting. Here, the crime lab witness who testified as to the scraping with a scalpel had nothing whatever to do with the rest of the case; that is, she had nothing whatever to do with the possession element of the crime. Her job was to do the science and say what the substance is, not where it came from. None of the other types of evidence that the *Buford* Court found to be important on the issue was taken in the present case.

Neither does *State v. George*, 146 Wn. App. 906, 193 P.3d 693 (2008), help Santos's argument. That case is factually distinguishable. There, a marijuana pipe had been found on the floor of a car with three occupants; defendant George was in the back seat. 146 Wn. App. at 912. None of the three acknowledged ownership of the pipe and all three were arrested and charged. 146 Wn. App. at 915. The arresting trooper testified to the denials of the three. Id. Defendant George was not driving and it was not his car. Id. No fingerprint evidence connected defendant George with the pipe. Id. The trooper admitted that the front seat occupants could have placed the pipe on the rear seat floor and he did not know whether or when this had happened. Id. at 915-16.

Obviously, the primary distinguishing fact between *George* and the present case is that Santos had the pipe in his pocket. There is no evidence or inference in the present case that someone else had control of the pipe. Clearly, there is no evidence that someone else placed the pipe in Santos's pocket. Thus, the present case is like *Buford*, not *George*. Like in *Buford*, Santos's case does not have the facts relied upon in *George*. Santos simply did not have the facts to support the instruction.

This record is devoid of "evidence sufficient to allow a reasonable juror to find, by a preponderance of the evidence, that [Santos] unwittingly possessed the contraband." Santos may have had an unwitting theory of

defense but he had no facts with which to support that theory. Moreover his argument ignores the threshold requirement that there be sufficient evidence to persuade a fair-minded juror by a preponderance. Failing that, the trial court properly refused the unwitting possession instruction. This claim fails.

B. EVIDENCE OF SANTOS'S PROXIMITY TO A STOLEN CAR WHEN HE WAS FIRST SEEN BY LAW ENFORCEMENT WAS PROPERLY ADMITTED UNDER THE RES GESTAE EXCEPTION TO THE ADMISSIBILITY OF PRIOR BAD ACTS.

Santos next claims that that the trial court erred in allowing evidence of the circumstances of his arrest. This claim is without merit because the trial court's ruling properly applied the res gestae exception to 404(b). Moreover, it is unclear on this record that the evidence as it was received would allow an inference of criminal propensity.

A trial court's decision to admit ER 404 (b) evidence is reviewed for abuse of discretion. *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007) (En Banc). The trial court's discretion is abused if its ruling is based on untenable grounds or untenable reasons. Id. ER 404 (b) evidence is any evidence that is offered to "show the character of a person to prove the person acted in conformity" with that character. Id., *citing State v. Everybodytalksabout*, 145 Wn.2d 456, 466, 39 P.3d 294 (2002).

However, "[i]f the evidence is offered for a legitimate purpose, the exclusion provision of ER 404 (b) does not apply." *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995) (En Banc).

One such legitimate purpose is the res gestae rule.

> In addition to the exceptions identified in ER 404(b), our courts have previously recognized a "res gestae" or "same transaction" exception, in which "evidence of other crimes is admissible '[t]o complete the story of the crime on trial by proving its immediate context of happenings near in time and place.' "

State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929 (1995) *accord State v. Lillard,* 122 Wn. App. 422, 431-32, 93 P.3d 969 (2004). In *Lane,* the Supreme Court announced that the admissibility test in connection with the res gestae rule is "(1) the evidence sought to be admitted must be relevant to a material issue; and (2) the probative value of the evidence must outweigh its potential for prejudice." 125 Wn.2d at 831 (citation omitted). Further, the trial court must identify on the record the purpose for which the evidence is admitted. Id. at 832 (citation omitted).

In *Lane,* admission of several violent crimes committed in the 2 to 3 days before the murder was affirmed. One witness testified about an armed robbery committed by the defendants. 125 Wn.2d at 833. Two other witnesses testified that the defendants had crashed into their car and fled while wearing ski masks. Id. Another witness testified to one defendant displayed of a gun and later admitted to the robbery of a drug

dealer. Id. A bowling alley security officer testified that two defendants had set off a smoke bomb in the bathroom of the bowling alley. Id. at 833-34. The two were barred from the bowling alley and upon leaving yelled obscenities and threw another smoke bomb at the building. Id. at 834. Next, a witness testified that he had seen a gun fired from car associated with the defendants. Id.

The defense in *Lane* moved to exclude all the above testimony but the trial court allowed it. The Court of Appeals reversed. But the Supreme Court reversed the Court of Appeals and criticized that Court's departure from the abuse of discretion standard. 125 Wn.2d at 835. The Supreme Court noted with approval that the trial court had ruled that the evidence was relevant and admitted for the purpose of establishing that the three codefendants had acted in concert in the subsequent murder. Id. Thus there was no abuse of discretion. Id. *See also State v. Lillard, supra,* (in possession of stolen property prosecution, admission of evidence of other uncharged thefts to rebut defense that defendant did not know items were stolen not abuse of discretion).

In allowing the complete story of this incident into evidence, the trial court allowed Santos to establish that he had not been charged with any offense from the fact of the stolen car. This tends to negate any prejudice. Since the jury was well advised that Santos was not charged,

his proximity to the stolen car bottomed no inference that he had committed a bad act regarding that car. This mere proximity is all there is in this record. Moreover, Deputy Mezen's contact with Santos makes little or no sense without the background as to how that contact came about. Similarly, the jury would have been left to wonder why Santos had fled the police. Such speculation may well have been more damaging to Santos. Moreover, neither proximity to the stolen car nor flight clearly allowed the search of Santos; the search was justified by arrest on the warrant.

In fact, exclusion of the stolen car fact may well have had the opposite effect—it may have prejudiced the state. That is, the jury would have been left with a record that leads to an inference that the deputy was simply harassing three males with backpacks in this incident. Recognizing these considerations, the trial court ruled that the fact of the stolen car is admissible as res gestae because "[i]t completes the chain of events." RP 15. The trial court balanced that ruling by allowing the defense to establish that no charges resulted from Santos's proximity to the stolen car. RP 15-16. The trial court offered the defense a limiting instruction and the defense declined that offer. RP 16.

Here, the evidence allowed to complete the story of this incident was nowhere close to the type of res gestae evidence allowed in the *Lane*

case. Clearly, the evidence of the stolen car and Deputy Mezen's conduct because of that fact were relevant to complete the story of this incident. The entire incident does not happen absent that fact. And, Deputy Mezen's conduct in seizing Santos would have been seen to occur in an unexplained vacuum. It was not an abuse of discretion to allow the state to tell the whole story.

IV. CONCLUSION

For the foregoing reasons, Santos's conviction and sentence should be affirmed.

DATED April 12, 2017.

Respectfully submitted,

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